

ED

In the Supreme Court of the 20 1973
United States

MICHAEL RODAK, JR., CL.

OCTOBER TERM, 1972

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation,
SUNSHINE BISCUITS, INC., a corporation, and
STANDARD BRANDS, INC., a corporation,

Petitioners,

vs.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA,

Respondent.

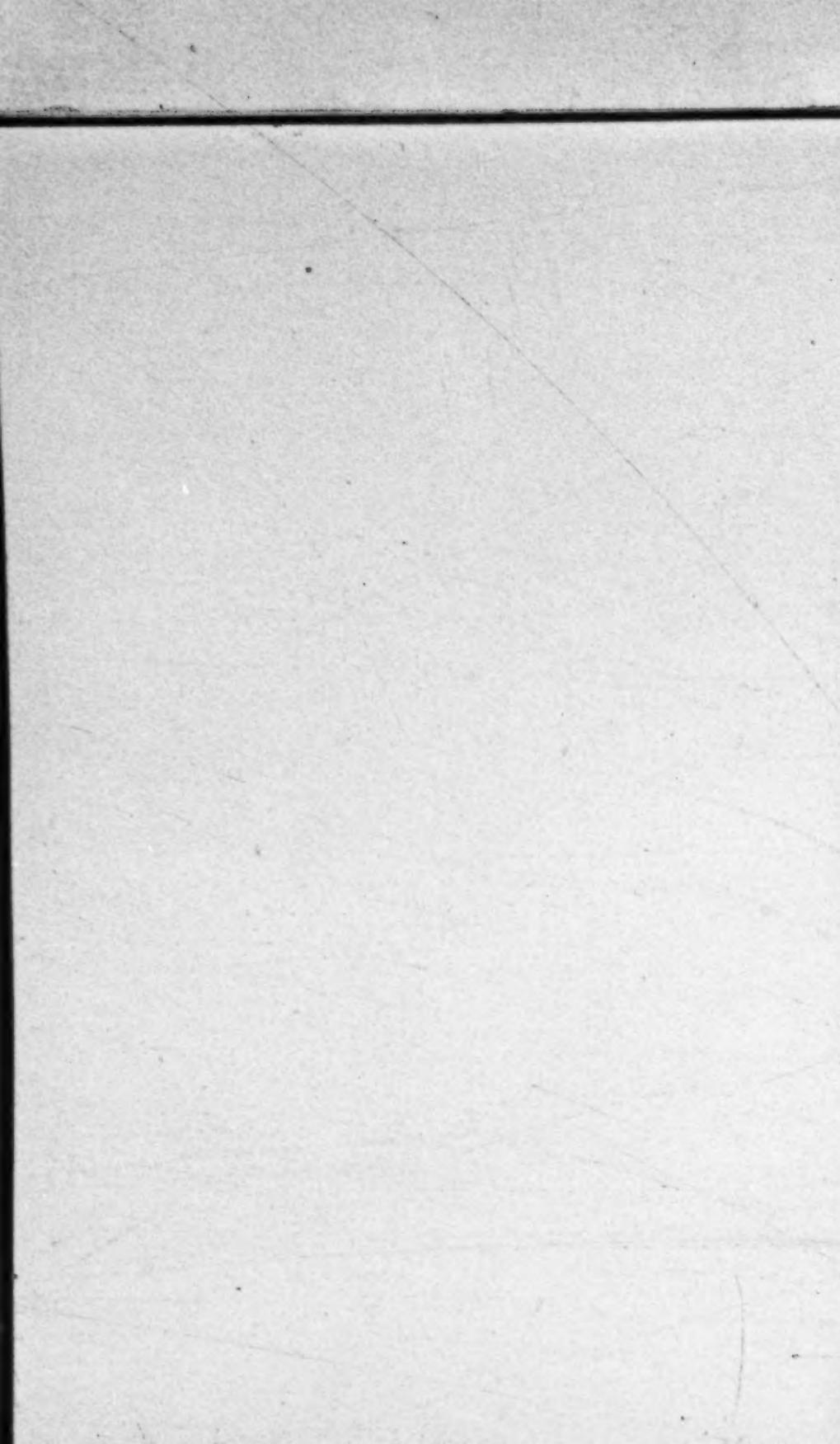
On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

BRUNDAGE, NEYHART, GRODIN &
BEESON
DUANE B. BEESON
VICTOR VAN BOUBG

100 Bush Street
San Francisco, Calif. 94104
Telephone: (415) 986-4060

Attorneys for Respondent



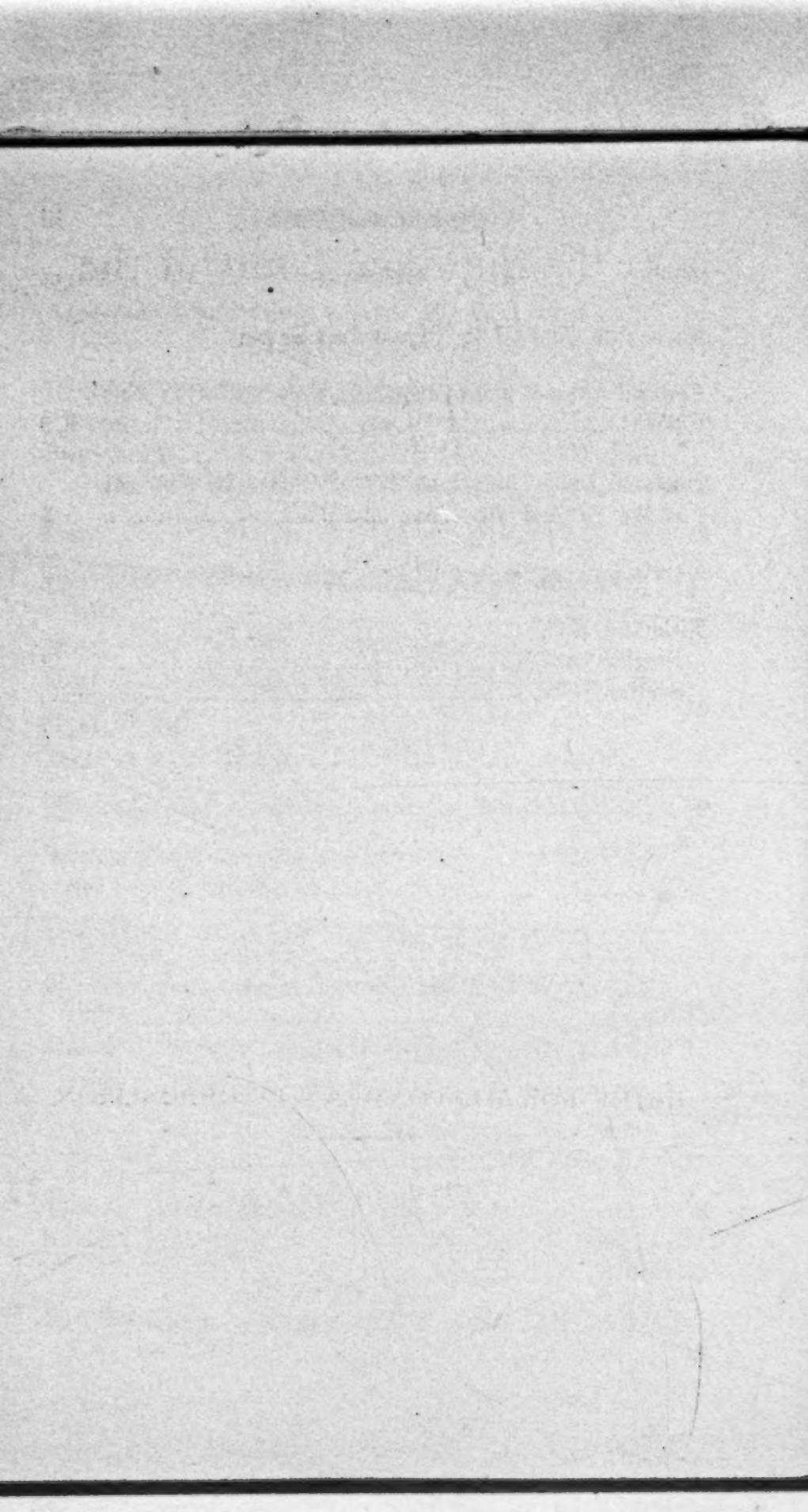
INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
A. The Proceeding in the State Court	2
B. Proceedings in the Federal District Court Immediately Following Removal	3
C. The Contempt Proceeding in the District Court	4
D. The Decision of the Court of Appeals	6
Argument	7
Conclusion	13

AUTHORITIES CITED

CASES	Pages
Appalachian Volunteers v. Clark 432 F.2d 530 (C.A.6, 1970)	10
Bailey v. Transportation Communication Employees Union, 45 RFD 444 (N.D. Miss. 1968)	10
Boys Markets, Inc. v. Retail Clerks Union 398 U.S. 235 (1970)	4, 12
Curtis Co. v. Ealls, Inc., 305 F.2d 811 (C.A.3, 1962)	9
Dry Clime Lamp Corp.v. Edwards 389 F.2d 590 (C.A.5, 1968)	9
Duncan v. Gegan, 101 U.S. 810 (1880)	9
Dunn v. Cedar Rapids Engineering Co., 152 F.2d 733 (C.A.9, 1946)	9
Ex parte Fisk, 113 U.S. 713 (1885)	9
Freeman v. Bee Machine Co., 319 U.S. 448 (1943)	9
General Electric Co. v. Local Union 191, I.U.E. 413 F.2d 964 (C.A.5, 1969)	11
Lockwood v. Sheedy, 157 Cal. App. 2d 744 (1958)	8
Morning Telegraph v. Powers, 450 F.2d 97 (C.A.2, 1972)	10, 11
Munsey v. Testworth Laboratories 227 F.2d 902 (C.A.6, 1955)	9
Peabody Coal Co. v. Barnes, 308 F. Supp. 902 (E.D. Mo., 1969)	11
Sharpe v. Brotzman, 145 Cal. App. 2d 354 (1956)	8
Sinclair Refining Co. v. Atkinson 370 U.S. 195 (1962)	4, 9-10, 12
The Herald Co. v. Hopkins 325 F. Supp. 1232 (E.D. N.Y., 1971)	11

AUTHORITIES CITED	iii
STATUTES	Pages
California Code of Civil Procedure Section 527	8
Federal Rules of Civil Procedure, Title 28, U.S.C. Rule 65(b)	6, 9
National Labor Relations Act, 29 U.S.C. Section 141 <i>et seq.</i> Section 301	3
Norris LaGuardia Act, 29 U.S.C. Section 101 <i>et seq.</i> ..	9
Title 28 U.S.C.	
Section 1254 (1)	2
Section 1450	6, 7, 8, 9, 10, 11, 12



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation,
SUNSHINE BISCUITS, INC., a corporation, and
STANDARD BRANDS, INC., a corporation,
Petitioners,

vs.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 472 F.2d 764. The order of the Court of Appeals rejecting the suggestion of petition for a rehearing en banc and denying the petition for rehearing is reprinted in the appendix to the

Petition at p. xii. The oral opinion of the District Court and the adjudication in criminal contempt is unreported, and is reprinted in the appendix to the Petition at pp. xiv-xxi.

JURISDICTION

The Opinion of the Court of Appeals was issued on January 18, 1973. A petition for rehearing was timely filed and denied on February 22, 1973. The petition for a writ of certiorari was filed May 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether Section 1450 of Title 28 U.S.C., had the effect of continuing in effect indefinitely a temporary restraining order of a state court issued without hearing, following removal of the proceeding to the federal district court, and the subsequent denial by that court of a motion to dissolve the order.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Petition at pages 3-4 and in the Appendix to the Petition, pages xii-xxiv.

STATEMENT

A. The Proceeding in the State Court

On May 15, 1970, petitioners filed a complaint in the Superior Court of the State of California for the County of Alameda alleging that respondent was engaging in a strike in breach of the collective bargaining contract to which petitioners and respondent were parties (R.6-12). Upon the filing of the complaint a temporary restraining order was issued without hearing which enjoined all strike activity (R.30-32). An order to show cause why a preliminary injunction was

simultaneously issued with a return date of May 26, 1970 (*ibid.*).

On May 19, 1970, respondent together with other named defendants removed the state court proceeding to the United States District Court for the Northern District of California on the ground that the action arose under 29 U.S.C. Section 185 (Section 301 of the National Labor Relations Act, as amended). On the previous day, May 18, 1970, unknown at the time of the removal to counsel for respondent, the employers had filed a "First Amended Complaint for Injunction" in the Superior Court (R. 43-50). The amended complaint was substantially identical to the original complaint, but added a party plaintiff and a party defendant (*ibid.*). At the time the amended complaint was filed the Superior Court issued a "Modified Temporary Restraining Order," again without hearing (R.112). The latter order differed from the first restraining order only in respect to its coverage, in view of the added parties in the First Amended Complaint (*ibid.*). A show cause order was issued in connection with the modified restraining order, with a return date of May 26, 1970 (R.113). On May 20, 1970, respondent and the other named defendants in the Superior Court action filed an "Amended Petition for Removal of Civil Action," attaching a copy of the First Amended Complaint, so as to insure the effective removal of the entire proceeding in the Superior Court (40-41). Following the amended petition for removal there have been no further proceedings in the Superior Court which are relevant to the Petition for Certiorari.

B. Proceedings in the Federal District Court Immediately Following Removal

On May 19, 1970, as soon as the state court case had been removed to the court below, respondent and the other named defendants filed a motion to dissolve the temporary restrain-

ing order issued by the state court (R.34-35). An order shortening time was issued, and the motion was noticed for May 22, 1970 (R.35, 62-63). Petitioners also filed a motion to remand the case to the Superior Court, and noticed it for the same day—May 22, 1970 (R.66-68).

The motions to remand and to dissolve were heard together by the court below on May 27, 1973, the delay having been occasioned by the transfer of the case to a different judge than the one originally assigned to the case. The motion to remand was denied in open court at the conclusion of the hearing (See R.123). The motion to dissolve, however, was taken under consideration. A ruling was handed down on June 4, 1970, denying the motion to dissolve on the authority of the Supreme Court's decision issued on June 1, 1970, in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), which in effect overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), upon which the motion relied (R.123). The record does not show any further activity in the District Court with respect to this case until the institution of the contempt proceeding involved in the instant Petition, which we describe below.

C. The Contempt Proceeding in the District Court

On December 1, 1970, petitioners filed a "Motion for Contempt Judgment" alleging that respondent "has failed and refused to comply with the provisions of the Modified Temporary Restraining Order" of May 18, 1970, by instituting strike and picketing activities against petitioners on November 30, 1970 (R. 125, 124-128).

The affidavits attached to the motion allege that on November 9, 1970, respondent sent petitioners telegrams requesting meetings for the purpose of negotiating a collective bargaining agreement (R.129, 132). Petitioners' attorney answered by letter dated November 11, 1970, stating

that it was their position that a contract was presently in effect, and declining to negotiate on that ground (R.130, 133). In a letter dated November 13, 1970, respondent's attorney informed petitioners' attorney that it was the position of the respondent Union that there was no such contract in effect, and also that there was no order in effect which "forbids Local 70 from bargaining with the employer" (R.135). The letter further states that it was also respondent's position that the restraining order issued by the Superior Court on May 18 "has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction" (R.135). The affidavits in support of the contempt motion further allege that picketing and strike activity by the Union was in fact begun on November 30, 1970, and was in effect on December 1 when the motion was filed (R.138-139, 144-145, 147, 152, 154).

The District Court issued an order shortening time for the hearing on the contempt motion, and the matter was heard the morning of the following day, December 2, 1970, (R.161). At the outset of the hearing respondent orally moved to quash the order to show cause on the ground that the temporary restraining order which was alleged as the basis for the contempt action was no longer in effect. The motion was summarily denied. Evidence was thereupon presented to the effect that respondent had instituted picketing on November 30, 1970, in support of its request for bargaining and a contract, and that a work stoppage was then in effect. At the conclusion of petitioners' case, respondent moved for a continuance for the purpose of preparing a defense, counsel for respondent having had opportunity to read the contempt papers for the first time on the morning of the hearing. The motion was denied,

and the District Court forthwith stated its conclusions and issued its order from the bench.

The District Court found respondent guilty of criminal contempt, based upon the picketing and strike activity which began on November 30, 1970. In the District Court's view, these activities were "in open and flagrant defiance of the order of the Court" which had been issued without hearing on May 18, 1970, more than six months previously (Pet.App., p. xx). A fine of \$200,000.00 was imposed against respondent, of which \$150,000.00 was made "conditional on the [respondent's] failure to purge itself within 24 hours of the date and hour of the signing of the Court's order (*ibid.*)."

D. The Decision of the Court of Appeals

The appeal from the District Court raised procedural issues in addition to the question presented by the Petition for Certiorari. The Court of Appeals, with one judge dissenting, concluded that the order which the District Court found respondent to have violated had expired prior to the events upon which the contempt adjudication were based, and accordingly did not pass on the other questions.

In reaching its conclusion, the court below noted that the temporary restraining order would have expired under California law not later than twenty days after issuance (which would have been June 7, 1970), and under Rule 65(b) of the Federal Rules of Civil Procedure could not have remained valid for any longer period had it initially been issued by a federal district court (Pet. App. pp. v-vi). Petitioners' argument that Section 1450 of Title 28 U.S.C. had the effect of continuing indefinitely the validity of the order of May 18, 1970 was rejected by the court below. In providing that state court orders "shall remain in full force and effect until dissolved or modified by the district court",

Section 1450, according to the court below, preserves the terms, scope and duration of the state court order for the identical "life span" which the state court had given it. Since the order could not have survived beyond June 7, 1970, the court below concluded that Section 1450 could not have given effect to the order beyond that date, and that it was therefore not in existence in November and December, 1970, when respondent was alleged to have violated it. In explanation of its conclusion, the court below reasoned (Pet. App. pp. v-vi) :

"Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restraining orders without any loss of potency during the trip. It adds nothing to the terms of the state orders. The purpose of Section 1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. [Petitioners'] construction of Section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders."

ARGUMENT

The decision below is correct and does not warrant review by this Court. The conflict between the circuits which petitioners claim is overstated. None of the statements from the opinions of the courts of appeal relied upon petitioners to show a conflict constitutes a considered determination of the question presented.

1. The plain language of Section 1450 of Title 28 U.S.C. guarantees the continued existence of a state order issued

prior to removal in precisely the same form and substance that it was issued, until and unless expressly dealt with by the federal district court. No inference can be drawn that the language of that provision was intended to alter, prolong or otherwise narrow or expand any such order. Accordingly, the court below properly determined that Section 1450 did not affect the duration of the state court order involved in this case, and that its duration was fixed by the state court and state law.

The temporary restraining order of May 18, 1970 expressly terminated on May 26, 1970, the return date of the show cause order issued in conjunction with it. The court below assumed that the order could have been extended at the most until June 7, 1970, pursuant to Section 527 of the California Code of Civil Procedure, which provides in relevant part as follows (See Pet. App., p. xiii):

"In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order."

It is not, and could not seriously be contended that the court below misread either the restraining order or California law in holding that the May 18, 1970, order expired no later than June 7, 1970. See, *Sharpe v. Brotzman*, 145 C.A.2d 354, 359 (1956); *Lockwood v. Sheedy*, 157 C.A.2d 744, 745 (1958). It follows, as the Court of Appeals held, that Section 1450 of Title 28 U.S.C. maintained the May 18 order in effect not later than June 7, 1970.

This conclusion is in accord with holdings of the courts of appeals in removal cases involving analogous situations

that Section 1450 neither cures defects in nor alters the terms and conditions of state orders. See, e.g., *Dunn v. Cedar Rapids Engineering Co.*, 152 F.2d 733, 734 (C.A. 9, 1946); *Curtis Co. v. Falls, Inc.*, 305 F.2d 811, 814 (C.A. 3, 1962); *Dry Clime Lamp Corp. v. Edwards*, 389 F.2d 590, 595-596 (C.A.5, 1968); *Munsey v. Testworth Laboratories*, 227 F.2d 902 (C.A.6, 1955); cf., *Duncan v. Gegan*, 101 U.S. 810, 812 (1880). The decision below is also fully consistent with, and is required by federal policy dealing with the duration of temporary restraining orders issued without hearing. As noted by the court below, such an order expires by operation of law under Rule 65(b) of the Federal Rules of Civil Procedure ten days after its issuance, and cannot be extended for more than an additional ten days. There is substantial doubt whether Section 1450 could legitimately be read to overcome the impact of Rule 65(b) in view of the established principle that a proceeding is governed by federal law following removal. See *Ex parte Fisk*, 113 U.S. 713; cf. *Freeman v. Bee Machine Co.*, 319 U.S. 448, 452. Whether analyzed under Rule 65(b) or under the state law which controlled its issuance, the order of May 18, 1970 could not have been substantively modified by Section 1450 in such a manner as to give it an effect permitted under neither state nor federal law.

2. Petitioners' contention that the District Court's denial of respondent's motion to dissolve the May 18 order constituted the granting of a preliminary injunction, which then remained in effect during the subsequent events in this case, is without merit (Pet. pp. 16-18). The order of May 18 was in effect by its own terms at the time the motion to dissolve was filed, and the sole issue raised by the motion was whether the Norris-LaGuardia Act deprived the court below of jurisdiction to maintain it in effect in view of the then prevailing rule of *Sinclair Refining Co. v. Atkinson*,

370 U.S. 195. Neither factual, contractual nor equitable grounds were presented for adjudicating the propriety of issuing injunctive relief against the Union. Such issues, of course, would have been appropriate for hearing on an application for a preliminary injunction, but petitioners did not apply, and indeed have never applied for the issuance of a preliminary injunction in the District Court.

The denial of the motion to dissolve thus constituted a ruling only that there was jurisdiction in the District Court to issue, or maintain for the period allowed by law, a temporary restraining order issued without a hearing. The issue of whether a preliminary injunction should be issued was not presented, was not heard, and was not determined. Cf. *Bailey v. Transportation Communication Employees Union*, 45 RFD 444 (N.D. Miss. 1968).

3. This case does not present the kind of conflict among the circuits which would warrant resolution by this Court.

Appalachian Volunteers v. Clark, 432 F.2d 530 (C.A. 6, 1970), which petitioners contend to be irreconcilable with the decision below (Pet. 10), does not support petitioners' position because the state court order involved in that case "had no termination date" (432 F.2d at 532). Accordingly, the holding of the Sixth Circuit that Section 1450 precluded "the automatic termination of the temporary restraining order" has no bearing on the situation where, as in the instant case, the state court order was of limited duration.

In *Morning Telegraph v. Powers*, 450 F.2d 97 (C.A.2, 1972) the Court of Appeals for the Second Circuit observed that a state court temporary restraining order of limited duration "was extended automatically by 28 U.S.C. Section 1450 when removed" (450 F.2d at 98). The quoted statement apparently conflicts with the holding of the court below, but there is no indication in the opinion of the Second Circuit that the issue was raised or fully considered.

The point is in no way central to the decision of the Court. The further assertion of petitioners that *Morning Telegraph v. Powers* also stands for the proposition that the denial of a motion to dissolve a restraining order is the equivalent of the granting of a preliminary injunction may be valid as applied to the facts in that case, but does not show conflict with the decision below. The Second Circuit's opinion shows that the District Court as well as the parties in *Morning Telegraph* treated the hearing on the motion to dissolve the restraining order as a full hearing on application for a preliminary injunction, and the considerations relied on by the District Court were relevant to the granting of a preliminary injunction. For reasons already stated, the same may not be said in the present case, where the motion to dissolve presented only a narrow jurisdictional issue.

General Electric Co. v. Local Union 191, L.U.E., 413 F. 2d 964 (C.A.5, 1969), cited in the Petition (p. 11) as in conflict with the decision below, does not deal with the Section 1450 problem. The only determination of the Fifth Circuit which relates to the instant case is that the motion to dissolve the state court order was there considered to have raised the same issues as an application for a preliminary injunction. As noted above, whether a hearing on a motion to dissolve is the equivalent of a hearing on preliminary injunction turns on the particular circumstances of the hearing in each case. Both the rulings of the Fifth Circuit in *General Electric* and the court below in this case may well be correct on this point in the light of the respective records in the two cases.

The two federal district court decisions cited in the Petition (pp. 11-12) (*Peabody Coal Co. v. Barnes*, 308 F. Supp. 902 (E.D. Mo., 1969), and the *Herald Co. v. Hopkins*, 325 F. Supp. 1232 (E.D.N.Y., 1971)) contain dicta that Section 1450

converts a state court order of limited duration into an order of indefinite duration. Again, however, the issue was apparently neither raised, briefed nor considered in either case, and the dicta does not constitute a considered judgment on the matter.

The decision of the court below is the only fully considered determination by a court of appeals as to the effect which Section 1450 has on a state court temporary restraining order of limited duration, and issued without hearing. There is no conflict with that decision of the kind which would warrant the granting of the Petition.

4. For two reasons, it is doubtful whether the question presented is of substantial importance in the administration of the removal provisions of Title 28 of the United States Code. First, the holding of this Court in 1962 in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), that federal district courts were without jurisdiction to enjoin union strikes in breach of contract brought about substantial activity in the removal of such cases from state courts. With the overruling of *Sinclair* by *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), the reason for that activity disappeared. It is not likely that the kind of problem involving state court temporary restraining orders in labor cases which is exemplified in the present case will be a recurring one.

Second, as a practical matter, it is simple for complainants who obtain temporary restraining orders to avoid the problem in this case. A motion for preliminary injunction may be filed at any time after removal in a case of this kind, and the matter brought on for orderly hearing and determination. There is no explanation in the record in the present case for petitioners' failure to follow that reasonable course. If, as petitioners assert, there is doubt in the minds of litigants about the effect of Section 1450 on state court orders issued without a hearing, it is a problem which can be easily resolved through routine procedures which would in any event be followed in the absence of removal.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: August, 1973.

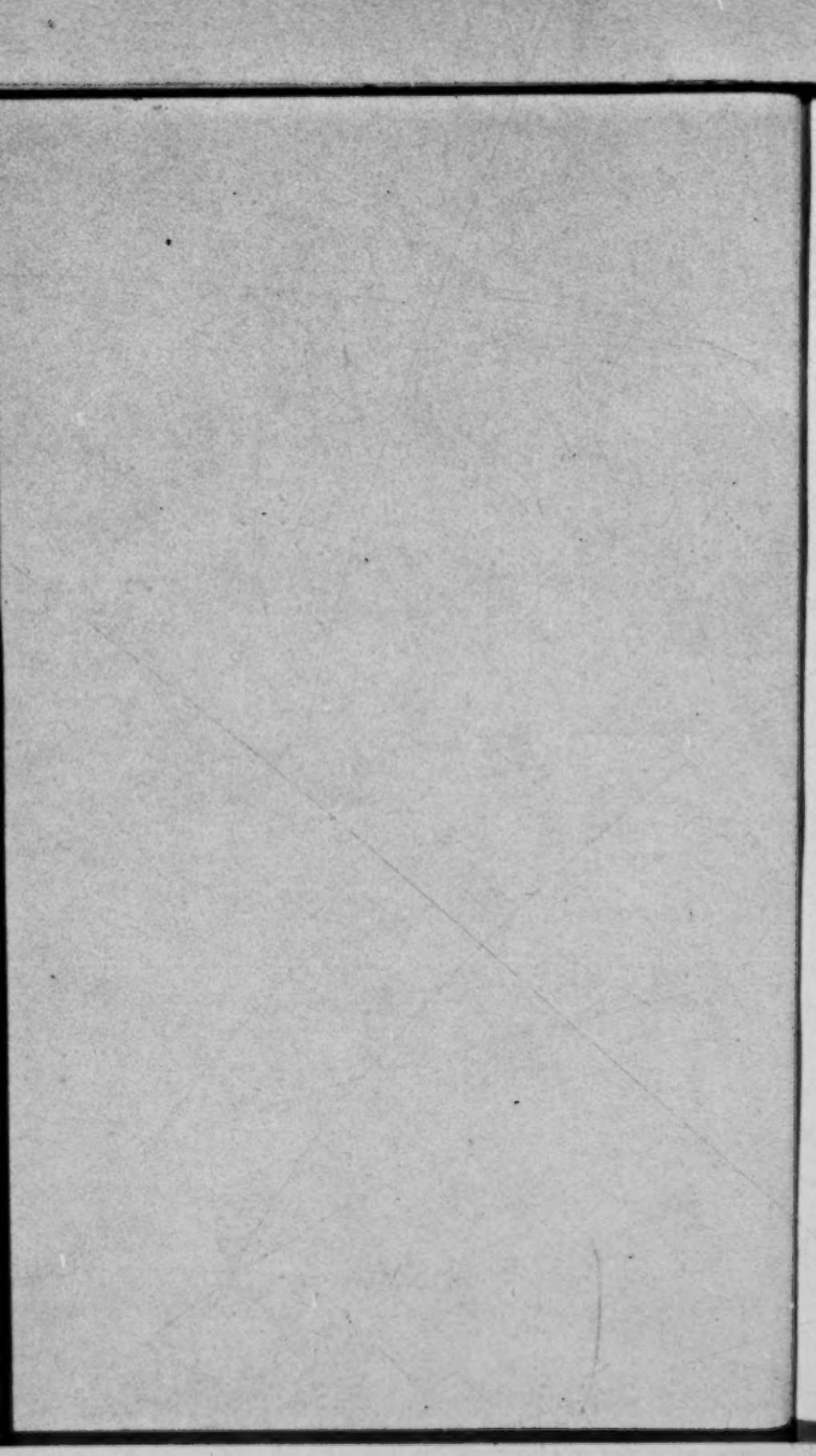
**BRUNDAGE, NEYHART, GRODIN &
BEESON**

**DUANE B. BEESON
VICTOR VAN BOURG**

100 Bush Street
San Francisco, Calif. 94104
Telephone: (415) 986-4060

Attorneys for Respondent





APPENDIX

In the Supreme Court OF THE United States

OCTOBER TERM, 1973

No. 72-1566

**GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE
BISCUITS, INC., a corporation, and STANDARD
BRANDS, INC., a corporation,
*Petitioners,***

vs.

**BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
*Respondent.***

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**Petition for Certiorari Filed May 22, 1973
Certiorari Granted October 9, 1973**

大正版權所有

Good morning all

$\text{ZnCl}_2 \cdot \text{H}_2\text{O}$

卷之三

37

Document
Docket
First App
Temporary
Modified
Cause
Petition
Amend
Bond
Notice
Points
Injuri
Affidav
Short
Order
Notice
Notice
Motion
Memorandum
to Re
Injuri
Affidav
Remain
Affidav
Short
Order
Order
Restr
Motion
Affidav
Affidav
Affidav

Subject Index

	<u>Page</u>
cket Entries	1
rst Amended Complaint for Injunction	6
emporary Restraining Order and Order to Show Cause	15
modified Temporary Restraining Order and Order to Show Cause	18
Petition for Removal of Civil Action	21
Amended Petition for Removal of Civil Action	26
nd on Removal	29
Notice and Motion to Dissolve Injunction	31
oints and Authorities in Support of Motion to Dissolve Injunction	33
idavit of Counsel in Support of Application for Order Shortening Time	33
nder Shortening Time	35
Notice of Related Cases	36
Notice of Motion to Remand	38
tion to Remand	39
memorandum of Points and Authorities in Support of Motion to Remand and in Opposition To Motion To Dissolve Injunction	40
idavit of George J. Tichy, II, in Support of Motion to Remand	50
idavit of Counsel in Support of Application for Order Shortening Time	52
nder Shortening Time	55
lder Denying Motion to Dissolve State Court Temporary Restraining Order	55
tion for Contempt Judgment	56
idavit of Wesley J. Fastiff	61
idavit of Del Ranche	70
idavit of Wm. C. Dreher	75